IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-342

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY TO THE RESPONDENT'S MEMORANDUM IN OPPOSITION

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1. The Secretary's Response does not address the Tribe's main contention in support of its argument that the government has consented to the attorneys' fee award in the unique circumstances presented by this case. In its petition (pp. 19-21), the Tribe placed its

[1] By order of the Court, the Solicitor General was directed to file his response to the Tribe's petition by February 1, 1975. On February 7, 1975, the Solicitor General gave the Tribe's counsel a copy of his Memorandum in Opposition which, as we understand it, was then being sent to the printer. This reply is in response to that draft memorandum which had not been filed on February 9, 1975 when we went to press.

principal reliance on the funds that have been and continue to be authorized and appropriated by Congress for the purpose of protecting Indian water rights. We pointed out that these funds had in fact been used to enable Indian tribes to retain expert hydrologic consultants and attorneys, the same purposes that would be served by the district court's award.

On January 13, 1975, the Commissioner of Indian Affairs, Morris Thompson, filed an affidavit with the United States Court of Appeals for the Tenth Circuit in case No. 74-1069, *State of New Mexico* v. *Aamodt*. It is reproduced in the Appendix to this Reply (pp. 9a-12a). Four New Mexico Pueblos appealed from the district court's denial of their motions to intervene in a pending water rights adjudication in which Justice Department attorneys were representing the United States as trustee on behalf of the four Pueblos. The Commissioner's affidavit recites that because of the government's fiduciary obligations to the Pueblos and its conflicting responsibilities to opposing interests, the BIA had approved a contract between the Pueblos and private attorneys and had provided funds for all of their "services, disbursements and expenses." The Commissioner stated that the district court's order denying the Pueblos' intervention "defeats the intentions and actions of the Bureau of Indian Affairs—that the government's trust responsibilities to the Pueblos . . . be discharged by providing private counsel of the Indians' choice to work in cooperation with, but independently from, the attorneys of the Department of Justice."

If private attorneys are required to represent the interests of Indians in protecting and preserving their water rights when the Department of Justice is at least

nominally on the same side, they are even more essential when a tribe must sue the government to protect its property. If the BIA has the authority and the obligation to provide funds for the Pueblos' private attorneys, it has the same authority and even more of an obligation to pay for the Pyramid Lake Tribe's reasonable attorneys' fees awarded by the district court after the government had repeatedly and consistently failed to honor its fiduciary obligations. The Commissioner's recent affidavit establishes beyond any doubt that the policies of Congress and the Interior Department would be furthered, not frustrated, by a decision upholding the district court's award.

2. The distinction between costs and attorneys' fees, which is essential to a proper understanding of 28 U.S.C. § 2412, was made by this Court in *People of Sioux County* v. *National Surety Co.*, 276 U.S. 238, 243-44 (1928) as well as in *Trustees of the Internal Improvement Fund* v. *Greenough*, 105 U.S. 527 (1882). *See* Pet. at pp. 8-9. Both cases narrowly construed "costs" statutes so as to permit attorneys' fee awards.

In the *Sioux County* case, the Court held that attorneys' fees are not "costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like" and, therefore, are "not within the field of costs legislation covered by" the fee bill of 1878. And then, even more importantly for our purposes, the Court stated:

> That the particular mode of enforcing the right [to an attorneys' fee award]—i.e. by taxing the allowance as costs—is not available to the federal courts under [the fee bill of 1878] does *not* preclude the recovery. 276 U.S. at 243-44. (emphasis added)

3. In September 1974, at approximately the same time that the Tribe's petition was filed, the United States submitted a Brief in case Nos. 73-1790 and 73-2033 before the United States Court of Appeals for the Fifth Circuit in *Gates* v. *Collier* and *Newman* v. *Alabama*.[2] The United States argued that this Court's Eleventh Amendment decision in *Edelman* v. *Jordan*, 415 U.S. 651, 39 L.Ed2d 662 (1974), does not bar the award of attorneys' fees against state officials in suits seeking equitable relief from constitutional violations.

> The award of attorneys' fees in the cases, now before this Court, does not fall within either the letter or the spirit of the *Edelman* decision as an award of attorneys' fees is not a "cause of action" but a normal and incidental consequence of litigation. In choosing to defend an action which is properly within the federal forum, defendants must assume responsibility for these tangential expenses. Cf. *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927).[3]

Other than its reliance on 28 U.S.C. § 2412, the government offers no legal or policy reasons why sovereign immunity should preclude equitable awards of attorneys' fees against the federal government even though the Eleventh Amendment does not afford the same protection to the states and their officials. Indeed, such a result would be anomalous in the extreme and should obviously be avoided if at all possible.

4. The issue presented in this case, whether federal courts are powerless to award attorneys' fees against

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[2] These cases are presently being considered by the Fifth Circuit en banc. *See* the discussion of the panel's original decision in *Gates* at p. 13 of the Tribe's petition.

[3] Brief of the United States in Gates v. Collier, *supra* at p. 7.

federal officials absent (very) express statutory consent, is not properly before the Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society* (No. 73-1977, argued January 22, 1975). There the environmental plaintiffs sought attorneys' fees only from Alyeska, not from the federal defendant. The court of appeals reached the § 2412 issue *sua sponte* without benefit of briefing.[4] Neither Alyeska, the petitioner, nor the environmental plaintiffs, the respondents, have challenged the court of appeals' 50 percent reduction in its attorneys' fee award that resulted from its construction of § 2412.[5] The respondents seek only an affirmance of the court of appeals' award. Therefore, under the rules of this Court, the § 2412 and federal immunity issues are not presented in the *Alyeska* litigation.[6]

5. There is a subtle, apparently unnoticed, yet nonetheless significant difference between the treatment accorded § 2412 in *Wilderness Society*[7] and in the opinions below of both the district court and the same court of appeals. In *Wilderness Society*, the court of appeals observed (incorrectly) that "under 28 U.S.C. § 2412 . . . no attorneys' fees can be imposed against the United States."[8] By contrast, both the district court (360 F.Supp. 669, 670; App. 35a) and the court of appeals (499 F.2d 1095, 1096; App. 29a) noted (cor-

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[4] Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

[5] The court of appeals could (and should) have reached the same result on the basis of the plaintiffs' failure, and consequent waiver of their right, to seek attorneys' fees against the federal government.

[6] Rule 23(d) of the Supreme Court Rules.

[7] *Supra*, note 4.

[8] 495 F.2d at 1036. It subsequently referred to § 2412 as a "statutory bar." *Id.*

rectly) that § 2412 does no more than codify existing law. This distinction is critical to the outcome of this case.

If § 2412 is a codification of existing law, the first inquiry is to determine what the existing law is. As we showed in our petition (pp. 15-21), both the district court and the court of appeals erred in their unanalyzed reliance upon the dicta of *United States* v. *Worley*, 281 U.S. 339, 344 (1930), a case in which the federal courts' equitable jurisdiction was *not* invoked. Rather, as the Second Circuit has now explicitly held in *Class* v. *Norton*, 505 F.2d 123 (1974),[9] and as the United States has argued in its recent Brief to the Fifth Circuit,[10] there is nothing in the immunity doctrine or in *Edelman* v. *Jordan*, *supra*, that bars equitable awards of attorneys' fees against state (and inferentially federal) officials found to have acted unlawfully or unconstitutionally.[11]

Once it is determined that federal courts have the equitable power to award attorneys' fees against federal or state officials under existing law, i.e. what the law would be in the absence of § 2412, and that § 2412 merely codifies existing law, the district court's award must be affirmed, albeit on different grounds. Without

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[9] Class v. Norton upheld an attorney's fee award against a state official acting in his official capacity on the basis of the official's bad faith or "unreasonable, obdurate obstinacy" in the litigation. 505 F.2d at 127. The district court here entered similar findings as to the Secretary's conduct during the course of the litigation. 360 F. Supp. 669 at 670; Pet. 34a.

[10] *See* text accompanying notes 2 and 3, *supra*.

[11] The question of the immunity of state officials is squarely presented in Jordan v. Gilligan, No. 74-403, in which the Sixth Circuit came to the opposite conclusion.

exception, the lower courts that have considered the federal immunity question have erred in not approaching the problem by way of examining the law applicable to the alleged immunity of state officials. If they had and if they reached the same result as the Second Circuit and the United States, they could not have concluded that § 2412 "necessarily and inescapably," or "in so many words" [12] restricts the federal courts from exercising an equitable remedy otherwise within their jurisdiction.

These important matters deserve this Court's attention. The petition for a writ of certiorari should be granted.

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[12] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). *See* Pet. 11.